85-1082

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE:

CONTEMPT CITATION OF

HUGH D. HOLBROCK

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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The Petitioner, Hugh D. Holbrock, respectfully prays that a Writ of Certiorari issue to review the Opinion of the State of Ohio Twelfth District Court of Appeals from which Decision the Ohio Supreme Court refused to review on October 23, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. Where a statute, to wit: Ohio Revised Code 2705.01 provides no penalty and no penalty is provided elsewhere for violation of a state, i.e. Direct Contempt, such statute is null and void, not a penal enactment, and it violates the requirements due process and equal protection of the Fourteenth Amendment to the U.S. Constitution to convict individual and sentenced individual under said statute.

2. Where a statute, i.e. Ohio Revised Code 2705.01, fails to allow rights guaranteed by the Ohio Constitution and Revised Code 2945.17 in that it denies due process and equal protection to those cited for direct contempt in denying them

the right to a jury trial while all other criminal defendants charged with a crime under Ohio law are guaranteed the right of a jury trial as long as there is a possibility of a jail sentence, and is therefore unconstitutional in its application.

3. Where there is no citation for direct contempt, no delineation of facts which constitutes contempt, nor a citation in contempt, the procedure is unconstitutional in that the defendant is not given notice of the charges and opportunity to prepare a defense to said charges, and Ohio Revised Code 2705.01 denies equal protection of the law to those convicted of direct contempt by failing to provide the same safeguards as to individuals charged with any other crime or with indirect contempt.

4. Defendant may not be held in direct contempt unless his alleged misconduct requires immediate punishment to preserve the court's authority and his conduct represents an obstruction to the administration of justice.

5. Defendant may not be punishment for direct contempt where there is no evidence that defendant intended to commit contempt or intended to obstruct administration of justice.

6. Defendant is denied due process of law where he is found in contempt and sentenced by a judge who took his conduct as a direct and personal affront.

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2. Article 1, Section 5 of the Bill of Rights of the Ohio Constitution provides that the right of a trial by jury should be inviolate. Pursuant to this constitutional guarantee is ORC 2945.71 entitled "Right to Trial by Jury" which guarantees that at any trial in any court for violation of any statute of this state, the accused has a right to trial by jury unless the possible penalty involved dies
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3. The court made no citation in contempt nor did the court delineate those facts which constituted contempt. The defendant was therefore not placed on notice of the nature of the charge against him nor given an opportunity to prepare a defense. In fact, in a summary contempt the defendant was immediately held in contempt and told that the punishment would be taken care of later. 8

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STATEMENT OF JURISDICTION

The Ohio Supreme Court declined to hear this matter on October 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

STATEMENT OF THE CASE

The case arose from the finding of contempt against Hugh D. Holbrock, co-counsel for a defendant, Danny Kingsley, in the case of State of Ohio vs. Danny N. Kingsley, Warren County Case No. 12399. On September 13, 1983 after argument on a motion, the Court found counsel with the contempt of court. The judge stated he would dispose of the matter later and on September 30, 1983 the court imposed sentence of $500.00 and two (2) days in jail, suspending all but $100.00.

The facts are relatively simple. During the criminal jury trial argument was made on a motion without the presence of the jury. After co-counsel for defendant, Mr. Ruppert, spoke on the motion Mr. Holbrock attempted to further address the motion. The Court told Mr. Holbrock he had no right to address the court and that he would have to go through co-counsel in order to argue the motion. A discussion ensued on the matter and Appellant Holbrock was held in contempt. He appealed this finding to the Twelfth District Court of Appeals which affirmed his conviction and the Ohio Supreme Court refused to hear the conviction.

REASONS FOR GRANTING WRIT

1. This Court should grant a Writ of Certiorari to review the finding of contempt of Hugh D. Holbrock, Attorney at Law, who had practiced 33 years and had never previously been held in contempt by any court. The contempt was based on Mr. Holbrock refusing to desist in arguing a motion and instead attempting to address the court on a point of law which was being argued outside the presence of the jury. The legal issues involved in this case are complex and involve numerous questions of constitutional and federal law concerning the rights of defendants who are being held in direct contempt.

Ohio Revised Code 2705.01 allows for summary punishment in contempt, but sets no particular punishment. However, Ohio Revised Code 2705.02 provides for indirect contempt and provides that the penalty can be no more than $500.00 and imprisonment for ten (10) days. The defendant was found to be in criminal contempt.

The law in the State of Ohio for every other defendant in any criminal action provides that where a statute creates a penal offense but contains no penalty for its violation, it is not enforceable. See 25 OJUR 3d §1 and §6. See also 21 AM JUR 2d -Criminal Law §5, which notes that this is the rule throughout the United States.

Since the Ohio Revised Code on direct contempt provides no penalty, defendant submits that by allowing absolute discretion to enact any penalty, theoretically all the way to life imprisonment, such statute violates the United States Constitution in that it creates a suspect classification, i.e. criminal defendants in one type of proceeding are not afforded same safeguards as every other criminal defendant.

2. Article 1, Section 5 of the Bill of Rights of the Ohio Constitution provides that the right of a trial by jury should be inviolate. Pursuant to this constitutional guarantee is ORC 2945.17 entitled "Right to Trial by Jury" which guarantees that at any trial in any court for

violation of any statute of this state, the accused has a right to tried by a jury unless the possible penalty involved does not excess fine of $100.00. The Court of Appeals of the Twelfth District held that Ohio Revised Code 2705.01 providing for direct contempt does not allow any provision for a jury trial except as delineated by this Court in Taylor vs. Hayes, 418 U.S. 488. Thus, even though the penalty in this case was not greater than six (6) months, the court in Ohio violated equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution by creating again a suspect classification, i.e. defendants in direct criminal contempt cases who would not have the right to a jury trial, while those who are could be held in indirect contempt or charged with violation of any other statute are allowed a jury trial under Ohio law.

3. The court made no citation in contempt nor did the court delineate those facts which constituted contempt. The defendant was therefore not placed on notice of the nature of

the charge against him nor given an opportunity to prepare a defense. In fact, in a summary contempt the defendant was immediately held in contempt and told that the punishment would be taken care of later.

Ohio law requires that in order to find an accused guilty of direct contempt there must be a complete and clear statement of the facts upon which the conviction is based. See 17 OJUR 2d -Contempt §68. See also State vs. Trion, 91 OLA 229, 188 NE 2d 308, where the Ohio Court of Appeals held that this is an absolute necessity. In addition it is axiomatic that the defendant has a right to know the nature of the charges against him and a chance to prepare a defense. The requirement of a citation and a finding for direct contempt is likewise the law throughout the United States, see 17 AM JUR 2d - Contempt §101 and §103.

The Defendant may also not be held in direct contempt unless the misconduct requires immediate punishment to preserve the court's authority and obstructs the administration of

justice. In this case the defendant was merely held in contempt, told that the matter would be disposed of later. In order to be held in direct contempt three elements must be present:

1. The conduct must require immediate punishment to preserve the court's authority;

2. It must take place in the presence of the judge in open court or before any of its constituent parts; and

3. It must obstruct the administration of justice by delaying, hendering or influencing a pending case or by constituting an immediate threat.

This Court in In Re McConnel, 27 US 230, held that where an attorney continued to attempt to ask certain questions after the judge ordered him to desist, that attorney could not be held in direct contempt of court because there was nothing in the attorney's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice. This Court further went on to note that 18 USC 401, which is nearly identical to the Ohio Statute 2705.01, did not allow summary contempt unless there was an actual obstruction of

justice. See in addition Harris vs. United States, 382 US 162, and In Re Little, 404 US 553.

Federal courts have decided the same. See In Re Jessup, 490 F 2d 1068, Third Circuit Court of Appeals, Hampton vs. Hanrahan, 600 F 2d 600, Seventh Circuit Court of Appeals, U.S. vs. Meyer, 346 F. Supp. 973, District Court, District of Columbia, and U.S. ex Rel Robson vs. Oliver, 470 F 2d 10, Seventh Circuit Court of Appeals. It is extremely important to realize that the court did not sentence appellant until the end of the trial. The court took no further action other than to say "I find you in contempt". Thereafter, there was still an argument on the objections for a brief period and then the jury was returned to the courtroom. There was no evidence in the record that there was any immediate need for penal vindication of the court's authority, nor was there any immediate threat to the obstruction of justice.

Also, it must be noted that there was no demonstration that defendant had any intent to

commit a contempt of court or any intent to obstruct the administration of justice, a requirement for conviction of direct contempt. See In Re Little, 404 US 553 and In Re McConnel, 37 US 238. See likewise United States vs. Delahonte, 488 F 2d 209, Sixth Circuit Court of Appeals, U.S. vs. Sopher, 347 F 2d 415 and In Re Dellinger, 379 F Supp. 1304, affirmed 502 F 2d 813.

Contrary to this law, the Court of Appeals of the Twelfth District held that intent to obstruct justice was not a necessary element, but it merely must be shown that the defendant's conduct tended to obstruct justice even though he may not hav intended the same. In addition, it should be noted that defendant was merely stressing a legal argument on behalf of his client outside the presence of the jury.

4. It was error for judge not to disqualify himself and appoint another judge to hear the matter where the judge took appellant's conduct as a personal affront. The court itself

stated that the court did not like the way the appellant spoke to the court made it clear that it was considered a personal affront.

This Court in the case of Mayberry vs. State of Pennsylvania, 400 US 455, held that by reason of the due process clause of the Fourteenth Amendment, a defendant in a criminal contempt proceeding should be given a public trial before a judge other than the one reviled by the contemner. This Court made it clear that where the judge becomes personally embroiled with counsel and takes counsel's conduct as a personal affront rather than needing to take immediate penal action to vendicate the dignity of the court, it was necessary to appoint a separate judge to hear the matter.

Therefore, Petitioner urges that this Court issue a Writ of Certiorari to review the matter because of the significant conflict of the ruling of the Twelfth District Court of Appeals with established Federal law because of the denial of equal protection and due process as guaranteed

by the Ohio Constitution in that the court created a special class of criminal defendants who were entitled to protections guaranteed to all other criminal defendants and because of the significant difference of the ruling of the Twelfth District Court of Appeals significant variance with the set of law of this state and other states in the federal system.

CONCLUSION

In conclusion, Petitioner Hugh D. Holbrock submits that this Court should grant a Writ of Certiorari to review this decision so as to settle the law nationwide as to the requirements of direct contempt and so as to protect the rights of members of the bar and further the right of defendants to have their attorneys press legitimate legal arguments on their behalf.

Respectfully submitted,

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APPENDIX

Filed in the Court of Appeals
Butler County, Ohio

June 10, 1985

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT

WARREN COUNTY, OHIO

IN RE:	* Case No. CA83-09-066
CONTEMPT CITATION OF HUGH D. HOLBROCK,	* MEMORANDUM DECISION AND
Appellant	* JUDGMENT ENTRY 6-10-85

Timothy R. Evans, Michael D. Shanks, Holbrock, Jonson, Bressler and Houser, 315 S. Monument Avenue, Hamilton, OH 45011, for Appellant

Michael Powell, Warren County Assistant Prosecutor, 313 E. Warren Street, Lebanon, Ohio 45036, for Appellee

PER CURIAM. This cause came on to be heard upon the appeal, transcript of the docket, journal entries, original papers from the Court of Common Pleas of Warren County, Ohio, an excerpt of proceedings, the transcript of proceedings upon sentencing, and upon the briefs and arguments of counsel.

Now, therefore, the assignment of error having ben fully considered, is passed upon in conformity with App. R. 12(A) as follows:

This appeal presents a simple and classic contempt of court proceeding for review.

From the record before this court, it may be observed that appellant, Hugh D. Holbrock, the contemner, an attorney engaged as co-counsel for the defense in a trial in progress,1 in the presence of the court while the jury was excused, and when confronted with what he considered an inappropriate rule2 and improper ruling by the court, persistently refused to comply with the court's repeated admonishment to sit down and be quiet.3 Despite numerous orders to desist, the appellant continued his banter with the cout and effectively invited a finding in contempt.

The Court perceived the appellant's behavior as a challenge to the court's authority and its responsibility to control and direct the conduct of the trial. The court summarily found appellant

to be in contempt and indicated that disposition would be made at a later date.

After some additional remarks, appellant withdrew, allowing the trial to proceed in or orderly manner. Thereafter, the court conducted a hearing before sentencing for contempt. Appellant was given an opportunity to speak in his own behalf4 and arguments were presented by his counsel.

The court imposed a fine in the sum of $500 and sentenced appellant to two days incarceration in the Warren County Jail. The Court suspended imposition of the jail sentence and $00 of the fine upon condition that the remaining $100 of the fine be paid in full by 4:00 p.m., September 20, 1983.

In his effort to ameliorate the trial court's disposition, appellant has brought this unfortunate matter for this court's review upon a single assignment of error which is stated as follows:

"The finding of the court that the appellant was in contempt is against the manifest weight of the evidence and contrary to law."

It is necessary for the court to make preliminary findings before addressing the issues raised by appellant.

The subject of contempt involves many concepts and it is difficult to define. In its broad sense, a contempt is a disregard of or disobedience to, the order or command of a public authority, legislative or judicial. In its restricted and more usual sense, contempt comprehends a despising of the authority, justice or dignity of a court; and one is guilty of contempt whose conduct is such as tends to bring the administration of the law into disrespect and disregard or otherwise tends to impede, embarrass, or obstruct the court in the performance of its functions.

Contempts fall into two major categories, direct contempt or indirect contempt. Direct contempt involves those actions which are directd

to the court itself, actions which show a disregard or disobedience to the authority of the court or its order -- actions which in the presence of the court are interruptive of the court proceedings by disorderly or insolent language, or which tend to impede, interfere with, or obstruct the court in its function. To constitute a direct contempt, the alleged misbehavior must (1) require immediate punishment to preserve the court's authority;5 (2) take place in the presence of the court or in or before any of its constituent parts, such as a courtroom or jury; and (3) obstruct administration of justice by delaying or hindering or influencing a pending case. State v. Treon (1963), 91 Ohio Law Abs. 229.

The circumstances disclosed by the record herein require a determination that the cause below was a direct contempt proceeding as acknowledged by appellant and one which is contemplated by R.C. 2705.01 which provides as follows:

"A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice."

We now turn to the question of whether the present contempt proceeding is to be classified as a criminal contempt or one civil in nature. Although there has never been a clear line of demarcation between criminal and civil contempts, it is usually said that offenses against the dignity or process of the court are criminal contempts, whereas violations whicha are on their surface offenses against the party for whose benefit the order was made are civil contempts. O'Brien vs. People (1905), 216 Ill. 354, 368, 75 N.E. 108.

"Sentences for criminal contempt are punitive in nature and are designed to vindicate the authority of the court. Gompers v. Bucks Stove & Range Co., 221 U.S., 418, 441, 31 S.Ct., 492, 55 L. Ed., 797; United States v. United Mine Workers of America, 330 U.S., 258, 302, 67 S.Ct., 677, 91 L. Ed., 884. On the other hand, the purpose of sanctions in a case of civil contempt is to coerce the contemnor in order to obtain compliance with the lawful orders of the court. Second National Bank of Sandusky v. Becker, 62 Ohio St., 289, 56 N.E., 1025, 51 L.R.A., 860."

State v. Local Union 5760 (1961), 172 Ohio St 75; overruled on other grounds, 64 Ohio St. 2d 252.

Review of the trancript of the proceedings on sentencing clearly indicates that the court below considered the conduct of appellant to be an offense against the dignity or process of the court.

The court stated:

> "I think we may be losing sight of why Mr. Holbrock was found in contempt. He was not found in contempt for disagreeing with the rule, whether that rule is agood rule or a bad rule or whatever; that is fine; that is open to discussion at any time. But if you read the transcript, time after time I thought I did it in a respectful, polite manner,
>
> requested that even though you disagreed with the rule, you should follow the rul, and we can discuss the rule some other time. But in my thirteen years on the bench, I haven't been engaged -- have not engaged in a dialogue such as went on in this and have been talked to like that and openly disobeyed.
>
> "I'm not a man of great ego. When I step down from the bench, you can say anything you want to me, and we can argue about anything you want to argue about, but I think it is the Court, not the person, that must be shown the respect due it. Not that I, personally, am due

> any respect, but the court system. The Court, itself, cannot be subverted by the dialogue that took place, but if it be so, then the Court of Appeals say that this was not an actionable contempt; so be it, but in my opinion it was actionable, and the Court did make that finding."

The trial court's statement and the punitive sanctions imposed requires this court to consider the contempt proceedings to be criminal in nature.

Appellant contends that the finding of contempt was against the weight of the evidence. We cannot agree.

The trial cour's finding that the appellant was guilty of a direct-criminal contempt of court is established by the record herein beyond a reasonable doubt. Treon, supra.

Appellant, in open court, during a trial in progress, conducted himself in a manner which impeded the orderly administration of justice and deprecated the dignity of the court. The record discloses that the court took immediate action to terminate appellant's contemptuous conduct and appropriately deferred imposition of sanctions

thereby avoiding any possible prejudice to the trial in progress. This court cannot find the judgment of the trial court to be against the manifest weight of the evidence.

Appellant further contends that the finding of contempt was contrary to law.

Appellant raises a mixed bag of issues on appeal, although somewhat obfuscated and overlapping. We will endeavor to address them as they coalesce and as we perceive them in relation to a review of direct-criminal contempt proceedings.

I

Initially and erroneously, appellant contends that criminal contempt is a violation of a criminal statute and since R.C. 2705.01 dealing with direct contempt proceedings no penalty, it fails as a penal enactment and a conviction thereunder would be contrary to law.

Contempt is a unique proceeding. While contempt may be an offense against the law and

subject to appropriate punishment, certain it is that, since the foundation of our government, proceedings to punish such offenses have been regarded as sui generis and not criminal prosecutions within the Sixth Amendment to the United States Constitution, or common understanding. State v. Treon (1974), 38 Ohio St. 2d 122, 128.

In no instance, however, is a contempt proceeding a criminal action or proceeding in a strict sense, but is a special proceeding which may be criminal in nature but which is governed by statute and outside the criminal code. Indictment, arraignment, plea and trial are not necessary procedures in cases of criminal contempt. Local Union 5760, supra. We conclude that R.C. 2705.01 is a statutory recognition of the inherent power of the court to punish for direct contempt. Local Union 5760, supra.

Due to the inherent power to punish, no penalty need be provided. Since contempt is not a criminal action, whether a penalty is set forth is irrelevant and R.C. 2705.01 is not

constitutionally infirm. In Re Neff (1969), 20 Ohio App. 2d 213.

The penalty imposed for direct contempt is let to the discretion of the court. The court's discretion is subject only to review for abuse. Weiland v. Indus. Comm. (1956), 166 Ohio St. 62. Upon the punishment of persons adjudged guilty of contempt, the courts have inherent power to impose a penalty reasonably commensurate with the gravity of the offense. State, ex rel. Turner, v. Albin (1928), 118 Ohio St. 527.

II

Appellant additionally argues that he was denied his right to a trial by jury in this cause. Reliance for this proposition is placed upon Section 5, Article I, Ohio Constitution, R.C. 2945.17 and Crim. R. 23(A).

As previously discussed, contempt, although denominated criminal contempt, is not a crime in Ohio and the power of the court to punish for contempt is an exercise of its inherent power

which existed prior to adoption of constitutional provisions. Since R.C. 2705.01 is considered a legislative recognition of the court's inherent power, and no penalty provision is proveded therein, we must conclude as did the Supreme Court of this state many years ago, that the summary power to punish for direct contempt of court is not violative of Section 5, Article I, Ohio Constitution. Wind v. State (1921), 102 Ohio St. 62. We further conclude that R.C. 2945.17 entitled "Right of trial by jury" is not applicable to proceedings in direct contempt.

Crim. R. 1(A) specifies: "These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in subdivision (C) of this rule." Crim. R. 23 provides that a trial by jury in serious offense cases m ay be waived and in petty offense cases, where there is a right of jury trial, the trial would be to the court unless a jury demand was made.

It should be noted that appellant herein made no request or demand for a jury at any point in said proceedings.

Appellant argues that the Supreme Court of the United States has determined that direct criminal contempt is not exempt from the constitutional guarantee of the right to trial by jury. This court acknowledges the authority submitted in suppot of such proposition; however, we find Taylor v. Hayes (1974), 418 U.S. 488, to be dispositive of the United States constitutional issue. At p. 495 of Taylor, the court held that:

> "Petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute."

As observed by appellee, the fourth paragraph of the syllabus in Neff, supra, explains the absence of costitutional rights as follows:

> "Where the circumstances are such that a judge has personal knowledge of the acts of direct contempt already committed, the person charged with

contempt by commission of acts has waived his rights which he might otherwise have had prior to or upon hearing and presentation of evidence. No hearing is necessary, since h has already by his own voluntary acts placed the evidence directly before the court under circumstances which preclude the court from having any opportunity to adivse him of any constitutional rights which might otherwise have been available to him. In such cases, a person may summarily be found guilty of contempt of court, unless the punishment imposed is of such severity as to classify the offense as a serious rather than a petty offense."

The penalty actually imposed herein establishes the same as a petty offense. There is no right to a trial by jury.

III

In Taylor, supra at pp. 497, 498, the court further stated:

IV

As Appellant acknowledges, R.C. 2705.02-10 establishes a procedure for indirect contempt. Appellant was found guilty of a direct contempt and the procedures referred to in the above sections are inapplicable.

In this matter, there could be no question that appellant was aware of the basis for the court's finding tha the was in contempt and, if unable to recognize a basis for such, he had ample opportunity to become apprised; he could have asked. I tis doubtful that his awareness would have been heightened by a bill of particulars if while be before the court, he failed to recognize any inappropriate conduct. At sentencing, appellant continued to insist that his only fault was the performance of his duty to his client. We find that no citation in contempt needed to issue nor was the appellant prejudiced for the lack of same.

V

Appellant also contends that the trial court's judgment or order finding an accused guilty of direct contempt must contain a complete and clear statement of the facts upon which the conviction is based.

While it is a general rule that in cases of direct contempt the judgment should contain a

complete and clear statement of facts upon which the conviction is based, it must be understood that such rule is for the purposes of review upon appeal. In this cause, the entire proceeding upon which the trial court based its decision is disclosed in the stenographic record, which is part hereof, and no order could contain a more complete and clear statement of the facts. Appellant's contention in this regard is without mereit.

VI

Appellant also endeavors to raise equal protection of the law issues on the basis that no penalty is provided for direct contempt; however, penalties are specified for indirect contempt. We find such contention is unsupported by appropriate authority and find it to be without merit.

VII

As we have noted, supra, a pronouncement of the Supreme Court in Taylor, citing Sacher, supra, precludes a finding that one could be guilty of

direct contempt if the contemptuous conduct does not require immediate punishment or banishment from the court. Appellant presents a potpourri of authority presumably intended to support the contention that his obdurate behavior did not obstruct justice. There can be little question that the record before the court discloses sufficient interruptive bahavior which constitutes or tends to constitute an obstruction to justice.

As previously noted, but for appellant's ultimate withdrawal from his contentious conduct and but for the court's reasonable restraint, the judicial process and the litigant's interest would have been seriously jeopardized.

VIII

Further, appellant contends that the record must show beyond a reasonable doubt that it was appellant's intention to be in contempt of court or to obstruct the administration of justice.

While the record suggests that such a burden might have been met, we nevertheless indicate that

intent is not an element of a charge of contempt in the presence of the court. Univis Lens Co. v. Workers (1949), 86 Ohio App. 241. Further, in such cause, the lack of intent is not a defense. Hunt v. State (1904), 5 C.C. (N.S.) 621. Lack of intent or a showing of good faith in such behavior may be shown in mitigation.

As pointed out be appellee, appellant's reliance upon the argument that local rule was misinterpreted and misapplied simply mised the crux of the matter. In the first instance, even though the court may have erred in it ruling, such error could be subject to a review upon appeal and, if prejudicial, would have been the basis for reversal.

IX

Finally, appellant leaps to a conclusion which is not supported by the record. I tis argued that judge William W. Young in this cause "took appellant's conduct as a personal affront requiring disqualification" and "clearly requires the appointment of another judge to hear the contempt."

This court views the record quite differently.

It appears to this court that the trial court was not motivated by a personal affront but was judicially frustrated by appellant's incessant repetitious remonstrations over the court's ruling which exhibited a contempt for the court and an orderly administration and conduct of the trial in progress.

There is not reason to have another judge determine the facts perceived by the judge and there is no prejudice since the record is before the court upon review.

Although the appontment of another judge to hear the evidence is warranted where the alleged contempt takes the form of personal insult or vilification of the judge (as there would exist the possbility of bias should the victim of such abuse pass judgment on the evidence [Mayberry v. Pennsylvania (1971), 400 U.S. 455]), no such personal attach occurred in the instant case. Bias is not implied from the fact that the contempt was directed to the court in which the

judge sits. It is a factual question for each case. State v. Weiner (1974), 37 Ohio St. 2d 11.

We conclude that appellant was guilty of a direct criminal contempt of court, that the sanctions imposed were reasonable and that the court below did not abuse its discretion.

Appellant's assignment of error is overruled and the judgment is affirmed.

The assignment of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court, being of the opinion that there was reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copyof this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

HENDRICKSON, P.J., KOEHLER AND JONES, JJ., concur.

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1 State of Ohio v. Danny Kingsley, Warren County Case No. 12399.

2 Rule 1.06(e) of the Order Establishing Rules of Practice of the Court of Common Pleas of Warren County states:

> "e) If any party has more than one counsel, then only one counsel for each party may examine or cross examine a witness. Although any counsel of record for a party may make objections at a

trial, only one counsel may argue any single objection.

3

"MR. HOLBROCK: Judge Young, we have to, I think- "MRS. HASH: I believe there is one at a time.

"THE COURT: Hugh, I'm sorry, you have to go through Jim.

"MR. HOLBROCK: You know I'll do just that. All I would like to put on the record -- to me when a jury is out, that is the most foolish rule I have ever heard of, to want to hurry things. I can, in other words, speed them up, but I will do as you say if that is the rule.

"THE COURT: What?

"MR. HOLBROCK: I said that it's the most foolish thing in the world when the Court says they would like us to try to speed things up, which I think you and we have all tried. To say, well, you have to go through -- when someone is here -- but I'll do just that. I can't understand the logic of such a thing -- and say, well - "THE COURT: We don't want it to get bounced back and forth. I made the rule. That is the rule. If you want to play by the rules, play by the rules. If you don't then don't play, you know. That is the rule of the Court. You follow the rule, okay?

"MR. HOLBROCK: I understand what you are saying of course. I will merely repeat that if you made the rule -- I will say to you personally -- I think it's a follish rule when the jury is out whenyou were trying to get to the answer of the problem. But there is no use you and I

discussing this now. I will be glad to take you out to dinner and discuss this with anybody, with logic, and see if you -- I don't want to waste time now -- to say we can't try cases in here - "THE COURT: If you don't want to play by the rule, that isn't the rule.

"MR. HOLBROCK: The Supreme Court makes the rules.

"THE COURT: Hugh, you and I have been -- you know, go back a long time, and I don't want to get in a fight with you now, so don't you -- don't sit there and start giving me a bunch of mouth.

"MR. HOLBROCK: Dont' you think this applies both ways, Judge?

"THE COURT: Hugh, while you are in here you play by my rules whether you like them or whether you don't. If you keep mouthing off, you won't say anything else. I will tell you that right now.

"MR. HOLBROCK: I won't.

"THE COURT: So, you just keep quiet. You got anything else to say, you go through Mr. Ruppert.

"MR. HOLBROCK: I'm glad to know that is the attitude of the Court.

"THE COURT: You know it.

"MR. HOLBROCK: And you know mine.

"THE COURT: You shut up, Hugh. I'm telling you right now. I don't want to hear anymore mouth.

"MR. HOLBROCK: Neither do I.

"THE COURT: If you've got something to say, go through Jim Ruppert if you have any comments. You talk to Mr. Ruppert or you don't talk at all.

"MR. HOLBROCK: That, of course, is putting it on the record in that way?

"THE COURT: I'm putting it on the record that if you open you mouth again, you will be in contempt of Court.

"MR. HOLBROCK: Thank you very much.

"THE COURT: Now, don't say anything else.

"MR. HOLBROCK: You wish to find me in contempt.

"THE COURT: Mr. Holbrock, I'm a patient man, but you've about worn out my patience, you know.

"MR. HOLBROCK: That's two of us.

"THE COURT: Mr. Holbrock, I find that you are in contempt of Court.

"MR. HOLBROCK: Fine.

"THE COURT: We'll dispose of the matter later.

"MR. HOLBROCK: Yes, sir.

"THE COURT: Now, don't you -- please, don't force me to. There is no reason for this. Now, if you are trying to make a point -- put on a show in front of your people, find, but there is no reason for you and I to stand here and go on and on. We're losing complete control of this case. The ultimate goal we are here for is to try to reach a resolution. It doesn't held if you and I stand here and

banter back and forth. That doesn't help anybody.

"MR. HOLBROCK: Right.

"THE COURT: That doesn't help your client; doesn't help you or me.

"MR. HOLBROCK: I do want to make it perfectly clear that your last statement is absolutely wrong. That i am not trying to put on a show for anyone. I am trying to assist the Court in determining the proper determination of this.

"THE COURT: Thank you. I appreciate all your help.

"MR. HOLBROCK: You haven't heard it.

"THE COURT: I'm trying very hard to keep conrol of myself and this trial, and it's not always easy.

4 Appellant stated, in part, as follows:

"I feel that I was performing my duty in a very straightforward, [sic] vigorous manner -- which is the duty of any counsel to any defendant -- and when that rule is abridged, justice can no longer prevail but tyranny will, but tyranny shall never prevail forever.

"And as we know, for one hundred years before Martin Luther King, the Supreme Court of the United States had heard cases of equality, but it was Martin Luther Kind who was willing to stand and pay the price to see that the Black people of this country received their rights to vote without the poll tax.

"I believe it was Thoreau that also went to jail bacause he refused to pay a small poll tax because he believed in his heart that which was just. An [sic] so, also, in the Revolution, Patrick Henry said when he was addressing the House of Burgess on the Stamp Act, they asked him -- he was talking about what they must do; that they must break away; that they must do something about this; that was a rule of the Stamp Act; that was a rule of England -- when the speaker, as he was in their midst spoke up and said, treason, and he said, if this be treason, make the most of it.

"And in leaving, I wish only to say this to you, in due respect, that I have never held this Court in contempt nor have I held any court in contempt, but I have held rules and regulations and unjust decisions -- which time and time again have been changed. So, I say to you, if this be contempt, make the most of it."

The full argument of contemner in his own behalf at sentencing is indicative of a total lack of contrition.

5 The requirement as set forth herein is not longer viable as discussed on p. 10 supra.

THE SUPREME COURT OF OHIO

COLUMBUS

1985 TERM

To wit: October 23, 1985

In re Contempt Citation of Hugh D. Holbrock, Appellant.	:	Case No. 85-1244
	:	E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Warren County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $22.00, paid by H. Holbrock.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copies from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY CLERK

_____ DEPUTY

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1082

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

IN RE: CONTEMPT CITATION OF
HUGH D. HOLBROCK,
Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENT WARREN COUNTY COMMON PLEAS COURT

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QUESTIONS PRESENTED

A. Will the Supreme Court of the United States exercise jurisdiction to consider a case in which a petitioner seeks review of factual findings of a trial court?

B. Does the equal protection clause or the due process clause of the fourteenth amendment to the United States Constitution provide the right of trial by jury for petty offenses?

C. Does the equal protection clause or the due process clause of the fourteenth amendment to the United States Constitution require that the contemptor in cases of direct contempt receive a citation in contempt?

D. Does the equal protection clause or the due process clause of the fourteenth amendment to the United States Constitution require in cases of direct contempt for the trial judge in whose presence the contempt occurred remove himself and appoint another judge to make a finding on the contemptor's contempt?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1082

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENT WARREN COUNTY COMMON PLEAS COURT

Respondent Warren County Common Pleas Court, respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Ohio in this case.

STATEMENT OF THE CASE

Petitioner was co-counseling the defense of a criminal defendant in a case being tried before the Common Pleas Court of Warren County, Ohio. After petitioners co-counsel had addressed the Court in argument upon a motion before the court out of the presence of the jury, petitioner began to address the court on the same motion. Petitioner was advised by the court that local court rules permitted that only one attorney be permitted to address any one specific issue. There ensued a dialogue between counsel and the court, a copy of which has been appended to the petition for a writ of certiorari heretofore filed in this court. Petitioner after several requests to desist from arguing with the court and after having shown disrespect for the trial judge was found in con-

tempt. The petitioner was subsequently sentenced to two days in jail and a $500.00 fine with the court suspending all but $100.00 of the sentence.

REASONS WHY THE WRIT SHOULD BE DENIED

A. WILL THE SUPREME COURT OF THE UNITED STATES EXERCISE JURISDICTION TO CONSIDER A CASE IN WHICH A PETITION SEEKS TO REVIEW FACTUAL FINDINGS OF A TRIAL COURT?

Petitioner in large part has asked this court to determine whether or not his conduct represented contempt in presenting an immediate obstruction of justice. No reviewing court is in a position to resolve factual questions such as those presented herein. In addition, the rules of practice of the Supreme Court, Rule 17.1, sets forth a non-exclusive listing of the special and important reasons which this court in its discretion will consider in determining whether to grant certiorari. The factual issues presented in petitioner's petition is not included among those special and important reasons and the respondent therefore respectfully moves this court to deny certiorari.

B. DOES THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDE THE RIGHT TO TRIAL BY JURY FOR PETTY OFFENSES?

In instances of direct contempt, as occurred here constitutional procedural due process rights including that to a jury trial, do not and cannot apply because of the need for the immediate punishment of one who is impeding and obstructing the function of the court by his contemptuous act. As Ohio Revised Code Sec. 2705.01 is not a criminal statute but rather provides for the procedure to be followed in cases of direct contempt, petitioner may now here claim that his contempt is

a serious offense for which trial by jury is required based upon that statute. It has long been recognized that the inherent power of a court to punish for contempt may not be limited by legislative authority as such would violate the doctrine of separation of powers. This court in the case of *Baldwin* vs. *New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed.2d 437 (1970) specifically recognized that in cases of contempt where there is no established maximum penalty the right to trial by jury depends upon the penalty actually imposed. *Baldwin*, *supra*, further held that the line of demarcation between petty offenses and serious offenses in which the right to trial by jury inheres, would be six months imprisonment. As the petitioner herein was sentenced to only two days in jail and only a $500.00 fine with all but $100.00 of the fine suspended the application of the "penalty actually imposed test", employed by this court in *Baldwin*, *supra*, can only result in a finding that the petitioners contempt is a petty offense for which his right to trial by jury does not apply.

C. DOES THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE THAT THE CONTEMPTOR IN CASES OF DIRECT CONTEMPT RECEIVE A CITATION IN CONTEMPT?

In cases of direct contempt, it is neither practical nor possible for the contemptor to receive a citation in contempt as his acts are occurring directly before the court and the need for immediate punishment to prevent the further obstruction of justice is required. This power is inherent in all courts and works no constitutional infirmary upon the contemptor.

D. DOES THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE IN CASES OF DIRECT CONTEMPT FOR THE TRIAL JUDGE IN WHOSE PRESENCE THE CONTEMPT OCCURRED REMOVE HIMSELF AND APPOINT ANOTHER JUDGE TO MAKE A FINDING ON THE CONTEMPTOR'S CONTEMPT?

It certainly goes without saying that in cases of direct contempt it is neither practical nor possible for the judge in whose presence the contempt occurred to remove himself and appoint another judge to hear the contempt. This is once again a matter that is inherent in the trial courts authority to control the proceedings and due to the very nature of direct contempt the court must be able to proceed in a summary manner to prevent the further obstruction of justice.

CONCLUSION

Respondent respectfully submits that the questions presented by the petitioner are either not cognizable before this court or present no federal constitutional violations.

Respectfully submitted,

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